U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

In the Matter of JOHN TIBBETTS and RICHARD BREMMER Complainants v. VERMONT COMPREHENSIVE EMPLOYMENT AND TRAINING OFFICE, CETA Respondent	)	Case Nos. 81-CETA-254 81-CETA-255

DECISION AND ORDER
of the
SECRETARY of LABOR

STATEMENT of the CASE

This matter arises under the Comprehensive Employment Training Act of 1973, as amended, 29 U.S.C. § 801 et seq. (CETA) and the regulations issued pursuant thereto, including the revised regulations at 20 C.F.R. § 656.88, 44 Fed. Reg. 20035-36 (1979). It was heard before Administrative Law Judge (ALJ) Anastasia T. Dunau in October 1982. Respondent Vermont Comprehensive Employment and Training Office (VCETO) requested that I assert jurisdiction in this case and I did so on September 9, 1983. Briefs were submitted by all parties to me. The ALJ has provided an excellent summary of the undisputed facts of this matter in her recommended Decision and Order which is appended hereto. Her findings as to the employment status of the Complainants and to the unlawfulness of their termination is adopted. Her award of back pay to the Complainants is adopted but the date

it terminates is modified to June 30, 1980, in lieu of October 22, 1982. Her decision that the Complainants are not entitled to attorney's fees is adopted.

BACKGROUND

The Complainants were employed as Regional Resource Specialists to act as support staff for State Regional Manpower and Services Councils (regional councils). These regional councils were to provide local input concerning employment opportunities to VCETO, the state agency charged with administering the CETA program in Vermont. The regional councils were originally authorized by a Governor's Executive Order in 1974, and the staff positions were subsequently established under the by-laws developed by the state agency. The Complainants were hired in March 1977 pursuant to these by-laws to serve as staff to two of the four regional councils (the other two staff persons are not parties to this action). Their salaries were paid out of the Governor's discretionary CETA funds, and were channeled through the Champlain Valley Work and Training Program (CVWTP). The record clearly establishes CVWTP to be merely the "paymaster" for the regional resource specialists, as an administrative convenience to Respondent, VCETO. There was never any intention by either VCETO or CVWTP that the latter exercise any supervisory responsibilities with regard to the regional resource specialists.

The regional resource specialists were under the supervision of the regional council chairpersons. The chairpersons were responsible for the day-to-day activities of their assigned

staff specialist. The chairpersons filled out performance evaluations on the staff specialists and submitted them to the Executive Director of VCETO. In July 1979, the regional resource specialists came under the direct supervision of VCETO's Executive Secretary.

In October 1979, VCETO did not renew its contract with CVWTP, but rather offered the Complainants individual service contracts. These contracts were materially less favorable to the staff specialists. They had no provision for any of the fringe benefits that the Complainants had heretofore enjoyed, they had a small wage increase to offset only a part of the benefit package loss, and they were for a term of 90 days, cancelable before that time on 30 days notice. The Complainants refused to sign the contracts claiming to have been constructively terminated without benefit of any of the merit staffing principles to which they were entitled as CETA program administrative staff.

The Complainants grieved this action by the Respondent and their allegations of wrongful termination were sustained by a state Hearing Officer. That decision provided for back pay to the Complainants as the appropriate remedy, since there had been significant changes in the CETA program's operations, including the reduction of VCETO administrative staff which made reinstatement inappropriate. The VCETO Executive Director declined to follow the Hearing Officer's recommendations. The Complainants then appealed to the Federal Grant Officer. The Grant Officer also found on behalf of the Complainants and ordered back pay

as restitution for their damages, from the time of their effective termination, October 1, 1979, until the date of his decision, April 21, 1981. This order was appealed by Respondent, and the matter was heard before ALJ Dunau on October 21 and 22, 1982. Judge Dunau found in favor of the Complainants and ordered the back pay to run from October 1, 1979, through the date of the hearings, October 22, 1982.

Respondents requested that I take jurisdiction over this matter on the issue of back pay and the Complainants requested that I reverse the decision denying them attorney's fees.

DISCUSSION

Were the Complainants employees of the Respondent?

The Respondent raises the threshold defense that the Complainants were not in its employ, but were independent service contractors, ab initio. A review of the record fails to sustain this contention.

A determination as to whether an employer-employee relationship exists usually rests on two predominating factors. First, is the right to control the ways and means that the work is to be accomplished; second, the economic reality that underlies the relationship. Between the two criteria, the right to control is paramount to the economic factor. Royce v. Bechtel Power Corp., 83-ERA-3, Secretary's Decision, March 1984. Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982); Hickey v. Arkla Industries Inc; 699 F.2d 826 (D.C. Cir. 1979). See also Minogue v. Rutland Hospital, 119 Vt. 336, 125 A.2d 796 (Sup. Ct. 1966), and, Thomas v. U.S. 204 F. Supp. 204 (D. Vt. 1962).

Congress has also distinguished between independent service contractors and employees when it amended the National Labor Relations Act, in 1947. (Labor Management Relations Act, Section 2(3), 29 U.S.C. 152 (3)).

> "'Employees' work for wages or salary under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor, and what they receive for the end result, that is, upon profits." H.R. Rep. No. 245, 80th Cong. 1st Sess. 18 (1947) quoted in NLRB v. Amber Delivery Service, 651 F.2d 57, 61 (1st Cir. 1981).

At no time during their employ could the Complainants be construed as independent service contractors. They were either under the direct supervision of the regional council chairpersons, or the Executive Secretary of VCETO. It is equally clear that they were not the employees of CVWTP. The record leaves no doubt that it was never intended for CVWTP to act in a supervisory capacity over the Complainants and in fact it never did so.

The Respondent additionally contends that if its theory of the Complainants being independent service contractors is rejected, that CVWTP rather than itself be considered the Complainants' employer.

Respondent's contention is based on the fact that the Complainants did not appeal the Grant Officer's award to them of certain cost of living salary increments which he determined had been wrongfully withheld by the Respondent, in a prior and separate grievance action. At that time, the Grant Officer used CVWTP's cost of living adjustment schedule to determine the amount to be awarded to the Complainants.

1 am not bound by the Grant Officer's device and reject Respondent's contention that I am, as being without foundation on the record. I therefore concur in the ALJ's finding that the Complainants were VCETO's employees and entitled to the same personnel protections afforded to all of its employees as a CETA Prime Sponsor and embodied in 29 C.F.R. 98.14(a) and 20 C.F.R. 676.43(a)(l).

Does the Secretary Have the Right to Intervene in This Matter?

The Respondents raise a collateral defense that the Secretary is without authority to address the alleged wrongs done to the Complainants as individuals. This contention is based on the wording of the Intergovernmental Personnel Act (IPA) (P.L. 91-648) which at once requires that all state employees be covered by merit staffing principles but precludes the Secretary as a Federal official from bringing an action on behalf of any individual state employee.

This contention is rejected. By adopting and making the standards for a merit staffing system of personnel administration applicable to CETA administrative staff, the Secretary did not also adopt the limitation of authority contained in the IPA. That restriction does not apply to the Secretary's extensive and independently derived authority under CETA itself to assure compliance with the statute by, among other things, ordering appropriate sanctions and remedies. This authorization is explicitly set forth at § 106(d) of the Act.

Respondent's further contention that any such sanction imposed by the Secretary would be violative of the federalism concept embodied in the Tenth Amendment to the Constitution has been found to be lacking in merit. See Kentucky v. Donovan, 704 F.2d 288 (6th Cir. 1982) citing Pennhurst v. Haldeman, 451 U.S.1 (1981).

Were the Actions of the Respondent a Substantive Violation of the Complainants' Rights?

The actions of the Respondent were a substantial violation of the Complainants' employment rights. A review of the record, including the testimony of various state Personnel Department officials indicates that the Respondent did not treat the Complainants as it did other state employees. Under Vermont law, the positions of the Complainants should have been classified, albeit as limited term employees, and as such would have had the protections granted other employees. Title 3, Vermont Statutes Annotated (V.S.A.) Chapter 13, §§ 310, 311, and 312.

Thirty months elapsed from the time the Complainants changed from Public Service Employment participants to regular, limited term employees of VCETO. The Respondent's initially unsuccessful attempt to classify the positions does not excuse it from trying again to meet the objections of the state Department of Personnel. The testimony of Claude Magnant, Director of the Division of Personnel, indicated that it is often necessary for agencies to redo position descriptions to satisfy both his department and the legislative committee that rules on personnel matters. He also testified (Testimony at page 62, et seq.) that the Respondent would have been prevented from acting as it did (i.e. offering

the Complainants individual service contracts) had the Complainants' positions been classified. All of these matters were within the control of VCETO. They neglected to undertake the required procedures and compounded the injury by arbitrarily changing the Complainants' terms of employment.

Is the Award of Back pay an Appropriate Remedy in this Matter?

The changing emphasis of the CETA program away from public sector employment toward private sector initiatives during 1980 precluded a remedy of reinstatement for the Complainants. The recommended award of back pay by the state Hearing Officer, the Federal Grant Officer, and the ALJ were proper as an effort to make the Complainants "whole." While the appropriateness of back pay was questioned by the courts prior to the 1978 amendments to CETA (See Great Falls v. Department of Labor, 673 F.2d 1065 (9th Cir. 1982)); since its enactment other courts have had no problem in affirming back pay awards. Regulations pursuant to the 1978 amendments have specifically indicated that back pay awards can be appropriate (20 C.F.R. § 676.91(c) (1980)). See Kentucky v. Donovan, 704 F.2d 288, 294 (6th Cir. 1982); County of Monroe v. Department of Labor, 690 F.2d 1359 (11th Cir. 1982); Milwaukee County v. Peters, 628 F.2d 609 (7th Cir. 1982).

.The courts have recognized the authority of the Secretary to make back pay awards even in cases where they set aside such awards. In those instances, there were technical defects in the procedures used by the agency, but the agency was clearly within its rights for terminating the employee notwithstanding its faulty process. See City of Boston v. Secretary of Labor,

631 F.2d 156 (1st Cir. 1982) [termination for cause even though the process was technically deficient]; County of Monroe v. Department of Labor, 690 F.2d 1359 (11th Cir. 1982) [termination substantively correct, but technically deficient]. When the deficiency adversely affected the employee's rights, back pay was appropriate until the deficiency was corrected. See City of Chicago v. U.S. Department of Labor, No. 83-1421, (7th Cir. 1984); In the Matter of Allen Gioielli, 79-CETA 148 (1982). In the matter now before me the wrongful action was not merely technical. There is nothing in the record to indicate that the Complainants were discharged for cause, nor were they afforded any of the procedural protections they were entitled to prior to discharge. (See 3 V.S.A. Ch. 13, § 312)

A back pay award was therefore appropriate and should have continued until such time as the defect was cured or until the Complainants' employment could have been lawfully terminated and not as a continuance of the agency's wrongful act.

Testimony at the hearing before the ALJ adduced that the regional councils went out of existance on June 30, 1980. The Complainants did not contradict this statement. The charters of the regional councils were allowed to lapse in response to the change in policy direction for CETA emanating from the Labor Department. The nonrenewal of the councils' charters after June 30 could not be construed as a continuation of VCETO's wrongful acts against the Complainants. With the councils out of existence, the reason for the Complainants' employment also ceased to exist. At that time, their jobs could have been lawfully abolished.

See Trico v. NLRB, 489 F.2d 347 (2d Cir. 1973). The Complainants did not show that they had superior rights at the time of their termination to any of the incumbents who were VCETO staff. It is also highly speculative if their seniority as resource specialists would have prevailed in a competative appointment to fill the Executive Secretary position which became vacant in September 1980. Such speculation can not give rise to legal remedies. See Wolfson v. U.S., 492 F.2d 1386 (Ct. Cl. 1974).

Since the termination dates for awarding back pay by both the Grant Officer and the ALJ were based on a premise that the Complainants might have had superior rights to the diminishing number of jobs in VCETO, I cannot sustain their determinations. Although there is no serious question that the Respondent did wrongfully adversely affect the Complainants' employment rights, there also does not appear to be any justification to awarding back pay to the Complainants beyond the date when their primary workplace no longer existed.

Are Awards of Back Pay Appropriate At This Time?

The CETA legislation authorizes the Secretary to "order such sanctions or corrective actions as are appropriate . .." and "... to take whatever action is necessary to enforce such order..." when a recipient of CETA funds has failed to comply with any provisions of the Act, or regulations issued pursuant to the Act. (See P.L. 95-524 § 106 (d)(l)). This authority survived the passage and implementation of the Job Training Partnership Act (JTPA) (P.L. 97-300) although other provisions of CETA

were rescinded and replaced by this Act.&/ Therefore, although the CETA program lapsed, the Secretary's authority to order appropriate actions to correct past noncompliance activities remains undiminished.

Did the Complainants Fail to Mitigate their Money Damages Against the Respondent?

I concur with the Grant Officer and the ALJ that the Complainants appeared to have made reasonable efforts to secure other employment.

The Respondent did not offer compelling evidence that either Complainant should have done more, even if it believes that more should been done. See EEO v. Kallir, et al, 420 F.Supp. 919 (1976).

Are the Complainants Entitled to Attorney's Fees?

The ALJ correctly determined that the Complainants were not entitled to attorney's fees under either the Back Pay Act (5 U.S.C. 5596) nor as punitive damages. Barring any statutory provision to the contrary, I will follow the majority opinion in Alyeska v. Wilderness, 421 U.S. 240 (1975), invoking the "American Rule" barring recovery of attorney's fees from the losing party.

1/ 29 USC § 1591

(d) All orders, determinations, rules, regulations, permits, grants, contracts, certificates, licenses, and privileges, which have been issued under the Comprehensive Employment and Training Act (as in effect.on the date before the date of enactment of this Act), or which are issued under that Act on or before September 30, 1983, shall continue in effect until modified or revoked by the Secretary, by a court of competent jurisdiction, or by operation of law other than this Act.

(e) The provisions of this Act shall not affect administrative or judicial proceedings pending on the date of enactment of this Act, or begun between the date of enactment of this Act and September 30, 1984, under the Comprehensive Employment and Training Act.

It is therefore ORDERED that Complainants are awarded back pay due them from October 1, 1979, through June 30, 1980, including all cost of living adjustments and benefits that became available subsequent to October 1, 1979. The award shall include such interest as is applicable pursuant to the DOL Regional Directive CPC 82-053, dated July 23, 1982. "Reinstatement and Payment of Back Wages Awarded Due to Terminations in Violation of the Act or Regulations."

The award to Tibbetts should be reduced by the amounts he earned pursuing his real estate sales from October 1, 1979, through June 30, 1980.

Raymond J. Donovan
Secretary of Labor

Dated: July 25, 1984
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: JOHN TIBBBETS and RICHARD BREMMER v. VERMONT CETA OFFICE

Case No. : 81-CETA-254 and 81-CETA-255

Title of Document: DECISION AND ORDER of the SECRETARY of LABOR STATEMENT of the CASE

A copy of the foregoing document was mailed to each of the following persons listed below on July 25, 1984.

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